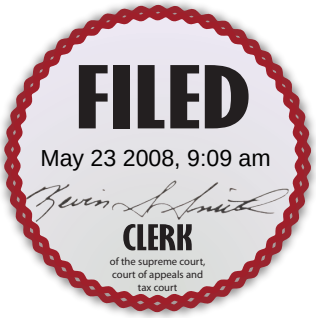

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IN THE
COURT OF APPEALS OF INDIANA

ROSS HUNT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0710-CR-845
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No.49G22-0705-FB-84314

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Ross Hunt appeals his sentence for robbery, a Class C felony. Hunt argues the trial court abused its discretion in finding aggravating factors and that his sentence of six years with three years suspended is inappropriate based on the nature of the offense and his character. Concluding the trial court acted within its discretion and Hunt's sentence is not inappropriate, we affirm Hunt's sentence. However, as Hunt points out, and the State concedes, the abstract of judgment incorrectly indicates that Hunt was convicted of robbery as a Class B felony. We therefore remand with instructions that the trial court correct the abstract of judgment.

Facts and Procedural History

On May 14, 2007, Hunt approached the victim outside a bar in Indianapolis. Hunt lifted up his shirt, displaying "what could have been a weapon but was never confirmed to be a weapon," and demanded money. Transcript at 12. The victim gave Hunt money.

On May 16, 2007, the State charged Hunt with robbery, a Class B felony. On July 18, 2007, Hunt entered into a plea agreement under which he agreed to plead guilty to robbery as a Class C felony and to admit to a probation violation. In return, the State agreed to recommend that the executed portion of the sentence be capped at six years.[1]

[1] The written plea agreement indicates that the State agreed merely to recommend that the executed portion be capped at six years. However, in advising Hunt of his rights, the trial court informed him that "the sentence is open to argument on all terms with cap of six years on the initial executed portion of the sentence," and stated that "the Court cannot give you any more than six years executed." Tr. at 8. The distinction between a plea agreement under which the State agrees to recommend a certain sentencing provision and an agreement under which the parties agree to a certain sentencing provision is important. Although a trial court is bound by the terms of a plea agreement it accepts, Ind. Code § 35-35-3-3(e), the trial court is not bound by a mere recommendation, see Robinett v. State, 798 N.E.2d 537, 540

On July 25, 2007, the trial court held a sentencing hearing. The trial court found as an aggravating circumstance Hunt's criminal history, consisting of:

> Juvenile record – found true for Resisting Law Enforcement as a D felony in April of 2000, found true in February of 2001, Possession of Marijuana as a Class A misdemeanor, probation revoked; guilty in 2002 of Resisting Law Enforcement as an A misdemeanor and probation revoked; guilty of Resisting Law Enforcement March 2003; guilty of two counts of Battery in domestic court in February 2004, probation revoked; guilty of a B felony Burglary in July of 2006.

Tr. at 24. The trial court found as a mitigating circumstance that Hunt had accepted responsibility. The trial court sentenced Hunt to six years, with three years suspended.[2] Hunt now appeals.

Discussion and Decision

I. Consideration of Juvenile History at Sentencing

Hunt acknowledges that a defendant's history of delinquent juvenile behavior is a valid aggravating circumstance. See Ind. Code § 35-38-1-7.1(b)(2); Allen v. State, 722 N.E.2d 1246, 1256 (Ind. Ct. App. 2006). However, Hunt argues that the trial court improperly considered his juvenile history, as he argues that the record "did not discuss the factual basis or conduct which supported the adjudications listed, but merely recited

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n.2 (Ind. Ct. App. 2003), trans. denied. It appears that all parties, the trial court included, were under the impression that they had entered into an agreement that bound the trial court to a sentencing cap, and not one under which the State had agreed merely to recommend a sentencing cap. We urge these and all other parties to take note of this distinction.

[2] Pursuant to the plea agreement, the trial court also ordered that Hunt serve three years of a previously suspended sentence for a probation violation. Hunt makes no argument as to the imposition of this sentence.

the offenses charged to be delinquent acts, and the dispositions of the charges." Appellant's Brief at 5.

Hunt relies primarily on Day v. State, 560 N.E.2d 641, 643 (Ind. 1990), in which our supreme court held that the trial court improperly relied on the defendant's juvenile record where "the presentence report and the rest of the record before the trial court neither revealed any facts about the events constituting [the defendant's] juvenile history nor demonstrated any adjudications." However, the presentence report here indicated that true findings were in fact entered on the charges of resisting law enforcement and possession of marijuana, offenses which would have been a Class D felony and a Class A misdemeanor, respectively, if committed by an adult. As our supreme court noted in Day, "the adjudication does play an important role in establishing a history of criminal behavior as a juvenile: 'The adjudication indicates that the history is correct. It elevates that history from allegation to fact.'" Id. (quoting Jordan v. State, 516 N.E.2d 1054, 1055 (Ind. 1987) (Shepard, C.J., concurring in denial of petition for reh'g)). Decisions rendered after Day have made clear that "juvenile adjudications may be used to enhance a defendant's sentence." McDonald v. State, 868 N.E.2d 1111, 1114 (Ind. 2007); see also Taylor v. State, 840 N.E.2d 324, 341 (Ind. 2006) ("A juvenile history detailed in a presentence report filed with the trial court may suffice as evidence of a criminal history constituting an aggravating circumstance." (quoting Evans v. State, 497 N.E.2d 919 (Ind. 1986))). As the presentence report in this case indicated that Hunt had been adjudicated a delinquent for the offenses of resisting law enforcement and possession of marijuana,

the trial court acted within its discretion in noting Hunt's juvenile history in its consideration of aggravating circumstances.

II. Appropriateness of Hunt's Sentence

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the [presumptive or advisory] sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

The advisory sentence for a Class C felony is four years, with a minimum sentence of two years and a maximum sentence of eight years. The trial court sentenced Hunt to six years with three suspended. Therefore, Hunt's total sentence lies halfway between the advisory and maximum sentence.[3]

Hunt makes no argument regarding the nature of the offense. Our review of the record reveals little that distinguishes the offense from the typical offense of robbery as a Class C felony.

In regard to Hunt's character, we recognize that he pled guilty. However, in exchange for this plea, the State agreed to reduce the charge from a Class B felony to a Class C felony. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied. Further, we note that Hunt has a fairly significant criminal history, consisting of burglary, a Class B felony; two counts of battery, both Class A misdemeanors; two counts of resisting law enforcement, both Class A misdemeanors; public intoxication, a Class B misdemeanor;

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[3] Even though the trial court suspended half of this sentence, we have recognized that "[a] suspended sentence is one actually imposed but the execution of which is thereafter suspended." Drakulich v. State, 877 N.E.2d 525, 534 (Ind. Ct. App. 2007) (quoting Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)), trans. denied. Still, as a defendant obviously would prefer a suspended sentence to an executed sentence, we are not completely oblivious to the fact that, assuming Hunt commits no further offenses and complies with the terms of his probation, he will execute a sentence below the advisory. Cf. Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007) ("The place that a sentence is to be served is an appropriate focus for application of our review and revise authority."); Hightower v. State, 866 N.E.2d 356, 373-74 (Ind. Ct. App. 2007) (recognizing that "the court made all the sentences concurrent, suspended half of the time for each, and permitted [the defendant] to serve one year in community corrections"), trans. denied. We also note that the trial court here extended further leniency to Hunt by allowing him to serve the executed portion of his sentence in Community Corrections.

and possession of marijuana, a Class A misdemeanor. Importantly, Hunt was found guilty of felony burglary roughly ten months prior to the commission of the instant offense. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that a criminal history's weight "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability."). Indeed, Hunt was on probation for the burglary offense when he committed the instant robbery. See Ryle v. State, 842 N.E.2d 320, 325 n.5 (Ind. 2005) ("Probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence [at the time he committed the instant offense.]"), cert. denied, 127 S.Ct. 90 (2006); Barber v. State, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007) (holding that even if the other aggravating circumstance was insignificant, the trial court would have acted within its discretion in ordering maximum sentences based on the fact that the defendant committed the crime while on probation), trans. denied. As discussed above, Hunt also had two juvenile adjudications. Finally, in addition to his convictions, Hunt has been charged with four misdemeanors and one felony in cases where the charges were dismissed based on the failure of essential witnesses to appear. See Miller v. State, 709 N.E.2d 48, 49 (Ind. Ct. App. 1999) ("Although an arrest record is not evidence of prior criminal history, '[t]his information is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime and is therefore properly considered by a court in determining sentence.'" (quoting Tunstill v. State, 568 N.E.2d 539, 545 (Ind. 1991))).

Based on Hunt's character, as evidenced by his criminal history and record of juvenile behavior and arrests demonstrating a lack of respect for the law, we conclude Hunt has failed to persuade this court that his six-year sentence, with three years suspended, is inappropriate.

Conclusion

We conclude the trial court did not abuse its discretion in sentencing Hunt and that his sentence is not inappropriate given the nature of the offense and Hunt's character. We remand solely so that the trial court can correct the abstract of judgment to indicate that Hunt was convicted of robbery as a Class C felony.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and RILEY, J., concur.